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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **JAN 16 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). It is now on appeal before the Acting Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a healthcare contractor. It seeks to permanently employ the beneficiary in the United States as a "registered nurse – clinical case manager" and requests that she be classified as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses. *Id.*

The regulation at 8 C.F.R. § 204.5(k)(4) states, in pertinent part, that "[t]he job offer portion of an individual labor certification, Schedule A application . . . must demonstrate that the job requires a professional holding an advanced degree"

The petition was denied by the Director on November 6, 2009, on two grounds: (1) the educational requirement for the nursing profession is no higher than a bachelor of science degree, making the job offer appropriate to a petition for a skilled worker or professional, not an advanced degree professional; and (2) the job posting listed the minimum requirements for the proffered position as a master's degree in nursing or a bachelor's degree with at least five years of experience, which did not correlate with the requirement in the ETA Form 9089, Application for Permanent Employment Certification, of a master's degree with no experience.

The petitioner filed a timely appeal, along with additional documentation. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with an uncertified ETA Form 9089 in duplicate. See 8 C.F.R. §§ 204.5(a)(2) and (k)(4); see also 20 C.F.R. § 656.15.

If the Schedule A occupation is for a professional nurse, the petitioner must establish that the beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); or a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* 20 C.F.R. § 656.5(a)(2).

Petitions for Schedule A occupations must also contain evidence establishing that the employer provided its U.S. workers with notice of the filing of an ETA Form 9089 (posting notice) as prescribed by 20 C.F.R. § 656.10(d), and a valid prevailing wage determination (PWD) obtained in accordance with 20 C.F.R. § 656.40 and 20 C.F.R. § 656.41. *See* 20 C.F.R. § 656.15(b)(2).

For the posting notice requirement, the employer must provide notice of the filing of an ETA Form 9089 to any bargaining representative for the occupation, or, if there is no bargaining representative, by posted notice to its employees at the location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1).

The regulation at 20 C.F.R. § 656.10(d)(3) states that the posting notice shall:

- (i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (ii) State that any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and
- (iv) Be provided between 30 and 180 days before filing the application.

Posting notices for Schedule A occupations must also contain a description of the job offered and the rate of pay. *See* 20 C.F.R. § 656.10(d)(6).

The evidence of record establishes that the petitioner met all of the documentation requirements discussed above before the petition was filed.

On appeal, the petitioner asserts that the Director erred in finding that the highest educational requirement in the nursing profession is a bachelor of science degree because the profession requires advanced degrees for most research, consulting, teaching, administrative, and clinical specializations in nursing. According to the petitioner, the proffered position of registered nurse – clinical case manager is properly classified as an advanced degree professional because it is a clinical specialization that requires a master's degree. The petitioner submits an excerpt from the DOL's Occupational Outlook Handbook (OOH) entry for "Registered Nurses" which confirms that a Bachelor of Science in Nursing is normally the highest degree required for a registered nurse, but that an advanced degree may be required for specialized positions in nursing. Another excerpt submitted by the petitioner from the DOL's Occupational Information Network (O*Net) identifies specific advanced practice nursing positions such as nurse practitioners, clinical nurse specialists, certified nurse midwives, and certified registered nurse anesthetists.

The OOH and O*Net excerpts submitted by the petitioner describe the job duties of registered nurses (RNs) – Standard Occupational Code (SOC) 29-1111.00¹ – as follows:

Assess patient health problems and needs, develop and implement nursing care plans, and maintain medical records. Administer nursing care to ill, injured, convalescent, or disabled patients. May advise patients of health maintenance and disease prevention or provide case management. Licensing or registration required. Includes advance practice nurses such as: nurse practitioners, clinical nurse specialists, certified nurse midwives, and certified registered nurse anesthetists. Advanced practice nursing is practiced by RNs who have specialized formal, post-basic education and who function in highly autonomous and specialized roles.

The position description of the "registered nurse – clinical case manager" at issue in this petition, attached to the ETA Form 9089 as well as the Form I-140, reads as follows:

The Clinical Nurse Case Manager (CNCM) will be responsible for all aspects of Case Management for an assigned group of inpatients to determine the appropriateness of the admission and continued stay, assists in the development of the Plan of Care, ensures that the plan is implemented in a timely basis, and identifies the expected length of stay (ELOS). The CNCM works collaboratively with Physicians, Social Workers, Clinical Nurses, Home Care Services, and other members of the interdisciplinary team. The CNCM actively participates in specific clinical initiatives focused on reducing the length of stay (LOS), improved efficiency, quality and resource utilization. Assignment will be by units/service and may encompass responsibility on other units/services.

The above job description appears to dovetail closely with the core description of registered nurses in the OOH and O*Net. The petitioner has not explained what specific tasks could not be performed by a registered nurse with a bachelor's degree or less. The petitioner has not explained why the proffered position requires specialized education beyond a bachelor's degree in nursing. The same applies to the evaluations of the proffered position by (1) [REDACTED] (PhD, RN, FNAP) from [REDACTED], dated July 14, 2009, and (2) [REDACTED] (PhD, Nursing) from the [REDACTED], dated July 21, 2009. Neither evaluation offers a persuasive explanation as to what specific tasks performed by the "registered nurse – clinical case manager" require advanced and specialized education beyond a bachelor's degree in nursing. In short, the petitioner has not shown how the proffered position qualifies as an advanced practice nurse. There is nothing in the job description of the proffered position that distinguishes it from an ordinary registered nurse. The educational requirement in the ETA Form 9089 is not what is normally required for the occupation and exceeds the educational requirement discussed in the DOL resources. See 20 C.F.R. § 656.17(h)(1)

¹ This occupational code is no longer in use and was replaced after the filing of the instant petition by four new codes. See <http://www.onetonline.org>.

A registered nurse does not necessarily require even a bachelor's degree, much less a master's degree. As indicated in the current OOH (2011-12), as well as the 2008-09 edition that was current when the instant petition was filed, there are three major educational paths to registered nursing – a bachelor of science degree in nursing (BSN), an associate degree in nursing (ADN), and a diploma from a hospital. BSN programs, offered by colleges and universities, take about 4 years to complete. ADN programs, offered by community and junior colleges, take about 2 to 3 years to complete. Diploma programs, administered in hospitals, last about 3 years. In general, licensed graduates of any of the three types of educational programs qualify for entry-level nursing positions. Thus, a master's degree in nursing is not required for a registered nurse position that does not involve an advanced and specialized practice.

Since the record does not establish that the proffered position is more than a basic registered nurse, the AAO agrees with the Director's determination that it does not require a master's degree in nursing. Accordingly, the job offer portion of the ETA Form 9089 does meet the regulatory requirement at 8 C.F.R. § 204.5(k)(4) because it does not demonstrate that the proffered position requires an advanced degree professional. On this basis alone the petition cannot be approved.

As for the Director's other ground for denial – the petitioner's inconsistent statements regarding the minimum educational and experience requirements for the job – the petitioner correctly points out on appeal that the job posting was not the offending document because it clearly states that a registered nurse's license and a master's degree are required. The ETA Form 9089, however, is not so clear. In Part H – Job Opportunity Information – it states that a Master of Science in Nursing is required, and that no other educational degree or alternate combination of education and experience is acceptable (Part H, lines 4, 4-B, 7, and 8). However, in Part H, box 11 (Job duties), the petitioner refers to an attached position description which states that the job qualifications include a master's degree in nursing or a bachelor's degree in nursing with at least five years of experience in "Emergency/ICU/CCU, homecare, long term care, Utilization Review, Discharge Planning, or Clinical Nurse Case Management."² Thus, the ETA Form 9089 is internally inconsistent with regard to the educational and experience requirements for the subject position of registered nurse – clinical case manager. Moreover, the ETA Form 9089 does not correlate with the job posting as far as the minimum requirements for the proffered position are concerned. While the Director mixed up the two documents in his decision, misidentifying the posting notice instead of the ETA Form 9089 as the one with the alternative education and experience requirements, the fact remains that the two documents do not present consistent minimum requirements for the job. For this reason as well the petition cannot be approved.

Finally, due to its substantive defects the ETA Form 9089 is not valid for the instant petition. The petition cannot be considered to be accompanied by an uncertified ETA Form 9089 as required by the regulations which describe the minimum requirements of the position. See 8 C.F.R. § 204.5.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the

² The same position description is referenced in the Form I-140 petition filed with the uncertified ETA Form 9089.

initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ, supra*.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.